BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. Ex Parte 704 708704

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

NOTICE OF INTENT TO PARTICIPATE AND WRITTEN TESTIMONY OF THE ALLIANCE OF AUTOMOTIVE MANUFACTURERS

The Alliance of Automotive Manufacturers ("Alliance") hereby notifies the Surface Transportation Board ("Board") of its intent to participate in the February 24, 2011 hearing in the above-captioned proceeding. The Alliance requests five minutes for its witness, Jeffrey O. Moreno. The Alliance appreciates the opportunity provided by the Board to comment upon the continuing utility of and issues surrounding the categorical exemptions under 49 U.S.C. § 10502. To assist the Board, the Alliance offers its views, which are based on the experiences of its member companies, and is confident that the Board will recognize the need to conduct a more detailed examination of the exemptions.

I. ALLIANCE INTEREST

The Alliance is the leading advocacy group for automobile manufacturers. Approximately 77% of all car and light truck sales in the United States can be attributed to its twelve members, BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen Group of America, and Volvo Cars North America. Alliance members rely on rail transportation to ship finished motor vehicles to dealers and transport inbound motor vehicle parts and accessories to their auto production plants. Because these commodities are exempt from regulation under 49 C.F.R. § 1039.11, Alliance members have first-hand knowledge of the effectiveness of the exemptions for motor vehicles and motor vehicle parts in the marketplace and the continuing validity of the Board's rationale for establishing those exemptions.

II. HISTORY OF EXEMPTIONS AFFECTING AUTOMOTIVE MANUFACTURERS

In 1993, the Interstate Commerce Commission ("ICC") exempted the rail transportation of finished motor vehicles and motor vehicle parts or accessories from regulation. Rail Gen. Exemption Auth. – Transp. Equipment, 9 I.C.C.2d 263 (1992) (hereinafter "Automobile Exemption Decision"). The ICC's rationale for the exemptions was that regulation of rail transportation of these commodities was unnecessary to carry out the rail transportation policy ("RTP") and "not needed to protect shippers from an abuse of market power." Id. at 265.

The Automobile Exemption Decision was short, comprising two pages of substantive text, and offered little discussion of facts underlying the ICC's rationale. In support of its decision that regulation was unnecessary to carry out the RTP, the ICC merely listed the positive benefits of the exemptions that would promote the RTP. See id. These benefits included relieving administrative and paperwork burdens associated with tariff filing and contract summary filing, insulating the issue traffic from frivolous, but potentially burdensome regulatory proceedings, and allowing quick and unhindered rate and service adjustments when changed market conditions require them. Id. The ICC's market power rationale followed a similar pattern and consisted of a short statement asserting that "[o]n account of motor carrier competition, geographic competition generally, and various shipper options and powers, there [was], overall effective competition for the rail transportation of motor vehicles and motor vehicle parts and accessories." Id.

It is necessary to read the ICC's decision soliciting comments upon a proposal to exempt automotive traffic to obtain additional details. See Rail Gen. Exemption Auth. – Transp. Equipment, Ex Parte No. 346 (Sub-No. 27), 1992 ICC LEXIS 135 (served July 9, 1992) ("Automobile Exemption Notice"). Because long-haul movements of automotive traffic were predominantly by rail, the ICC focused its review on the market power of railroads over this traffic. The ICC observed that "[g]eographic competition and the bargaining power and business options possessed by the automobile industry *suggest* that this traffic is not captive to the railroad industry." Id. at *4 (emphasis added). According to the ICC, at that time:

> The automobile industry is widely dispersed across the United States. In addition, there are significant movements of product across both the Canadian and Mexican borders, and other significant imports and exports moving through American ports. In this environment, geographic competition should be both pervasive and strongly effective. Parts, for example, can be obtained from a variety of origins. Finished cars can be sent to a variety of destinations. A movement on one rail line can be substituted for a movement on another. A truck haul can be substituted for a rail haul, and vice versa. And, because the American automobile industry and the points of import and export are so widely dispersed, a short haul truck movement can be substituted for a long haul rail movement. The existence of this widespread geographic competition makes it unlikely that any railroad could exercise market power with respect to long haul shipment of STCC 37 products.

Id. at *4-5. The ICC also identified, in much the same language as it used in the Automobile Exemption Decision, the benefits of an exemption as relieving administrative and paperwork burdens associated with tariff filing and contract summary filing, insulating the issue traffic from frivolous, but potentially burdensome regulatory proceedings, and allowing quick and unhindered rate and service adjustments when changed market conditions require them. Id. at *7.

There was very little opposition to the ICC's exemption proposal, which would explain the brevity of the Automobile Exemption Decision. Both the railroad and automotive industries supported the exemption. Because the rail industry was aggressively competing for automotive traffic in 1993, and regulatory requirements in place at that time were impeding that competition, there were good reasons for granting the exemptions. Only certain aspects of rail labor appear to have opposed it. Consequently, there was very little evidence in the record to challenge the ICC's initial assumptions in favor of granting the exemptions.

III. CHANGED CIRCUMSTANCES WARRANTING REPEAL OF THE EXEMPTIONS

Since 1993, there have been significant changes in both the automotive and rail industries to question the continuing validity of the ICC's rationale for granting the automotive exemptions. These changes have substantially reduced the geographic competition that was the linchpin of the Automobile Exemption Decision.

A. Reduced Geographic Competition

Since 1993, the rail industry has consolidated from twelve Class I railroads to seven, reshaping the competitive landscape and geographic control of the country's rail system. Today, four of the Class I railroads divide the country's rail system down the middle, with two operating in the east and two in the west. The remaining Class I railroads operate on the fringes of the two regions with minimal incursions into each region. Most automotive shippers, therefore, have experienced a decline in rail competition.

As a result of Class I railroad consolidation, the auto industry no longer experiences the competitive pricing and service commitments that existed at the time of the exemptions. Instead, the rail transportation market has taken on the characteristics of a duopoly. Because most geographic regions are served by no more than two railroads and often only one provides service to a auto producers facility, railroads have little incentive to compete. Bottleneck segments also have lengthened as a result of mergers, which have increased the distances for which a location is captive to a single railroad. Thus, an auto manufacturer's ability to substitute a movement on one rail line for a movement on another rail line is limited. Further, they cannot simply shift production to different geographic regions to take advantage of competition, because many production facilities have shut down in recent years, and the cost and downtime required to retool their plants in order to shift production among existing plants is prohibitive.

Auto manufacturers have experienced first hand the negative competitive effects of Class I railroad consolidation. Following the structural changes in the rail industry, rail rates have risen steadily over the past 5-6 years while railroads have reduced their service commitments. The competitive pricing and service commitments expected from consolidation have not materialized for auto manufacturers. Instead, the consolidation of carriers into two large regions has led to greater similarity in price and service offerings in the form of higher prices and fewer service commitments. Because many of the plants operated by auto manufacturers are captive to one railroad, rail consolidations have created even longer bottleneck segments over which auto manufacturers are captive. This is troubling for automotive manufacturers, as they generally enjoy less favorable rates over bottleneck segments as a result of the increased bargaining power

that bottlenecks afford railroads. Lacking effective, competitive, rail transportation options, auto manufacturers need protection from market power that Class I rail carriers wield.

B. Inadequate Intermodal Competition

While intermodal transportation options exist for automotive manufacturers, these options are inadequate when compared to rail for large portions of automotive traffic. This is especially true for shipments of finished vehicles, large and heavy parts, and long distance transportation.

Finished vehicles are not suited for domestic air or water transport, which leaves motor carriage as the only transportation alternative to rail. Most finished vehicles are transported by truck in only two circumstances: (1) short distances directly from the production plant to a dealer; and (2) short distances from a rail distribution center to a dealer after a long-haul rail movement. It is not economical to ship finished vehicles long distances by truck, nor is there sufficient truck capacity to shift significant volumes from rail to truck. Therefore, when a plant is captive to a single railroad, the only way around that bottleneck is to ship by truck to the rail head of a nearby competing railroad. This option, however, is impractical at high volumes and adds wasteful extra steps that slows transit and increases costs. Further, truck capacity at plant origins is insufficient to transload more than a small portion of a plant's vehicle production. Also, as the number of transloads increase, there is greater potential for vehicle damage, which affects salability and the public's perception of vehicle quality. Thus, there is no effective competitive alternative to rail transportation of finished vehicles.

Although a majority of auto parts and accessories move by truck today, the portion that moves by rail does so primarily because trucks simply are not practical alternatives. Because railroad service typically is not sufficiently consistent and reliable for today's "just-in-time" manufacturing, almost all parts and accessories that can move by truck already are moved by truck today. Those parts transported by rail include frames, engines, transmissions and axles. Trucks simply cannot transport these parts in a practical and cost-effective manner. Therefore, auto manufacturers are captive to rail for these inbound parts and accessories.

In addition, rail historically has enjoyed a significant cost advantage over motor carriage at longer distances, making it difficult for motor carriers to compete on long hauls. A decade ago, trucks were price-competitive with rail at distances only up to 250 miles. Today, that range has nearly doubled. This suggests either that motor carriers have become more efficient competitors at longer distances, or that rail has become less influenced by motor carrier competition. During this time, rates for both truck and rail transportation have risen, but rail rates have increased much more consistently and by a greater percentage. Also, rising fuel costs have made motor carriage less efficient than rail at longer distances. This strongly suggests that rail carriers have utilized their market power resulting from mergers and capacity constraints to increase their rates, which has caused motor carrier rates to be more attractive at longer distances than in the past. This exercise of market power has led to higher rail transportation costs for automotive manufacturers and underscores a reduction in the competitive constraints that motor carriage once imposed upon rail pricing.

C. Shippers No Longer Benefit From Exemptions.

The exemption benefits that the ICC identified in 1993 no longer exist. Those benefits were relieving administrative and paperwork burdens associated with tariff filing and contract summary filing, insulating the issue traffic from frivolous, but potentially burdensome regulatory proceedings, and allowing quick and unhindered rate and service adjustments when changed market conditions require them. Automobile Exemption Decision at 265.

In 1995, the ICC Termination Act eliminated most of those regulatory burdens for all shippers, without the need to obtain an exemption. See ICC Termination Act of 1995, Pub. L. No. 104-88, § 102, 109 Stat. 803, 803 (1995). For instance, the Act repealed the tariff filing requirements at former 49 U.S.C. § 10762 and contract filing requirements at former 49 U.S.C. § 10713. Id. Further, the Act increased the railroads' flexibility to make rate and service adjustments. Id. at 49 U.S.C. §§ 10702, 10703 (2006). Therefore, the railroads no longer needed an exemption to avoid the statutory burdens they faced when the exemption was created.

Consequently, automotive manufacturers are saddled with the burdens of an exemption that deprives them of regulatory remedies for railroad abuse of market power, but without any of the benefits that were expected to accrue. Moreover, these benefits were intended to enhance the ability of railroads to compete in ways that they no longer do.

IV. CONCLUSION

The factors that motivated the ICC to establish exemptions for finished motor vehicles and motor vehicle parts and accessories at 49 C.F.R. § 1039.11 have changed significantly. Production plants that are captive to a single railroad have little option but to ship the vast majority of their finished vehicles to market via that railroad. Although the vast majority of inbound parts do move by truck today, a sizeable volume still moves by rail because trucks are not viable options due to the size and/or weight of those parts. Today, rail carriers enjoy strong advantages over intermodal alternatives in the transportation of finished motor vehicles and a distinct subset of motor vehicle parts. Further, rail carriers enjoy a significant amount of freedom to alter their rates and services for this traffic in light of enhanced market power, without concern that auto manufacturers can seek regulatory remedies for abuses of that market power. The Alliance, therefore, supports an in-depth review of the continued utility of the exemptions for finished motor vehicles and motor vehicle parts and accessories.

Respectfully submitted,

Jeffrey O. Moreno
Thompson Hine LLP
1920 N Street, NW
Washington, DC 20036
(202) 331-8800

Counsel for the Alliance of Automotive Manufacturers